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THE WHITE HOUSE
WASHINGTON

August 22, 1978

THE VICE PRESIDENT
STU EIZENSTAT
BOB LIPSHUTZ

The attached was returned in
the President's outbox. It is
forwarded to you for appropriate
handling.

Rick Hutcheson

RE: Proposed Executive Order on the
Environmental Effects Abroad of
Major Federal Actions

IMM

PRECEDENCE

UNCLAS

CLASSIFICATION

FOR COMMCENTER USE ONLY

FROM: *PHIL WISE (BOISE)*

TO: *STU EISENSTAT*

(CAMP DAVID)

INFO: *SITUATION ROOM (WHITE HOUSE)*

DEX _____

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PAGES *13*

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RELEASED BY:

AC

SPECIAL INSTRUCTIONS:

221412Z

JO

THE WHITE HOUSE
WASHINGTON
August 19, 1978

*I called in
to Mondale*

MEMORANDUM FOR:

THE PRESIDENT

FROM:

STU EIZENSTAT *Stu*

SUBJECT: Proposed Executive Order on the
Environmental Effects Abroad of
Major Federal Actions

Bob Lipshutz was anxious that this memorandum reach you over the weekend, since Senator Stevenson's amendment to exempt the EXIM Bank from the application of the National Environmental Policy Act (NEPA) will be considered by the Congress this week. My understanding is that he has indicated a willingness to drop the amendment if our position on the issues presented is satisfactory. From my conversations with him, he strongly favors the State Department view of this matter.

The essence of this decision is the degree to which NEPA should be given what will be viewed as an extra-territorial impact. When this issue first surfaced many months ago in the context of a suit against the EXIM Bank to force the EXIM Bank to go through the procedure of developing an environmental impact statement on all projects which are financed abroad, it struck me as one of the most ridiculous interpretations of a statute possible. After months of following this issue and by attempting to resolve it through Executive Order, I remain strongly of the opinion that we should not require extra-territorial application of NEPA, except in limited situations dealing with "the global commons" -- that is the high seas and Antarctica.

This country has no business blocking a project in a foreign country which is perfectly permissible and legal in that country simply because the project would violate our environmental rules if it were built in the United States; nor should there be any impediment to such a project except in the most unusual circumstances.

While this is an issue on which the environmental community feels strongly, to impose environmental reviews on our foreign affairs and export activities would be a misapplication of

NEPA and would have serious adverse impacts on our ability to export and on the ability of the nuclear industry to survive and on the capability of the United States to be an assured supplier of nuclear fuel.

While considerable progress has been made over the last few months in resolving many outstanding issues, the positions taken by CEQ on the remaining issues before you will add to paperwork and Administrative complexity, are potentially inflationary, and will send a strong signal that we are going to add additional impediments to exports at the very time that we have developed an export policy to reduce those impediments.

Thus, in virtually every instance, I support the position taken by State, Treasury, Commerce, STR, and the EXIM Bank. Therefore, on the first decision, I believe the Executive Order should rest on constitutional authority only rather than on interpretation of NEPA. On the second issue, I think it is critically important to exempt nuclear exports, including nuclear fuel, with the exception of reactors, from the order so that our non-proliferation policy is strengthened and the United States is viewed as a reliable supplier of nuclear fuel. On the third issue, we should cover by the Executive Order toxic chemicals which are prohibited or strictly limited by Federal law in the United States, but should not go along with the CEQ recommendation for a broader list of products. This might create a bureaucratic nightmare in terms of the number of potential products.

On the fourth issue, I see no reason that agencies should be given the option to prepare environmental impact statements in the situations mentioned since this could create uncertainties.

On the fifth point, I do not think we should create a situation with CEQ oversight and would, therefore, favor the first of the three options, although I would have no strong objection to mandatory notification after taking of the action, the third option.

On the sixth point, I agree with the CEQ recommendation to somewhat limit the flexibility of agencies to further exempt their activities (option 2).

On the seventh issue, I agree with Bob Lipshutz' recommendation for option three, although I would view option 1 as also acceptable.

THE WHITE HOUSE

WASHINGTON

August 18, 1978

MEMORANDUM FOR THE PRESIDENT

FROM:

ROBERT LIPSHUTZ
MARGARET MCKENNA

RL
MM

SUBJECT:

Proposed Executive Order on the
Environmental Effects Abroad of
Major Federal Actions

Since the National Environmental Policy Act (NEPA) was enacted in 1969, there has been an unresolved issue whether the Act applies to environmental effects outside the United States of major Federal actions. The Council on Environmental Quality (CEQ) and the Environmental Protection Agency (EPA) maintain that the Act does so apply. State, Defense, Treasury, the Export-Import Bank, and the other agencies concerned with foreign affairs and foreign "economic" policy maintain that it does not or that it applies only in a limited way. Up to now no Administration has attempted to resolve the issue. Generally the agencies have not prepared an environmental impact statement (EIS) with respect to impacts in foreign jurisdictions; some agencies prepare statements with respect to the global commons (e.g., oceans, Antarctica).

The issue has been brought to a head this year by lawsuits brought against the Ex-Im Bank and the State Department seeking to require preparation of EIS's on environmental effects outside the United States; by regulations proposed by CEQ to require agencies to prepare documents as to impacts abroad (which met with strong opposition from agencies); and by an amendment to the Ex-Im Bank's Authorization Act proposed by Senator Stevenson to exempt the Bank from NEPA. The issue is highly divisive within the Administration and the Congress because of the important environmental, economic, foreign policy and national security implications. Those who support

environmental review of foreign affairs activities argue that it is necessary to protect the human environment. They point to increasing global environmental problems and to incidents where U. S. assisted efforts have caused unintended environmental degradation (including effects on neighboring countries) and where hazardous chemicals or facilities banned in the U. S. are exported. Senator Muskie and Congressmen Dingell and Leggett believe that, although in certain instances even the CEQ version is too weak, the State Department alternatives are substantially less than the law requires and urge you to support the CEQ version. The agencies that oppose such reviews argue that preparation of environmental documents on foreign impacts would strain our relations with other countries, damage promotion of U. S. exports, make it more difficult to redress the \$30 billion U. S. trade deficit, and undermine important U. S. foreign policy and national security policy objectives, including particularly the Administration's efforts to restrain proliferation of nuclear weapons.

To deal with this situation, we have encouraged CEQ and the Department of State to endeavor to negotiate a proposed Executive Order that would enable agencies to take foreign environmental effects of their actions into account consistent with U. S. economic, foreign policy, and national security interests. The basic concept is to find a practical approach which would avoid a direct resolution of the legal issue. After several months of intense effort, CEQ and State have agreed on the terms of an Executive Order except for a few issues which require your decision.

The basic scheme of the Executive Order is to direct the agencies to develop within eight months their own procedures for taking environmental considerations into account in accordance with the terms of the Order. For major Federal actions having significant effects in the global commons areas, the Executive Order would provide for the same kind of environmental reviews (i.e., EIS's) that agencies must conduct under NEPA in domestic cases.

The Order identifies environmental effects that should be taken into consideration, gives agencies the option of using one of three types of environmental review documents (two under State's version), details what Federal actions are exempt from the Order and the

considerations that agencies may take into account in establishing exceptions and modifications to their procedures.

The result of the Order would be the first systematic United States Government program to take into consideration environmental impacts in foreign countries. While several agencies have expressed concern over issuing an Order now because of possible impact on our fluctuating foreign exchange market, we believe the Order has adequately met the concerns of the economic community. CEQ wants you to know that it and the environmental community believes that CEQ's version is barely acceptable and that State's version is anti-environmental. It is important to resolve this issue now in order to avoid a court imposed resolution (there is a lawsuit pending on this issue), or a legislatively imposed resolution. (The Stevenson amendment, to be acted upon next week, would exempt Ex-Im Bank from NEPA.)

CEQ and the State Department have reached agreement on most areas of the Executive Order. The following issues remain and are presented for your decision.

In a legal memorandum to us, the Justice Department advised us of their position on each of the seven issues. It reflects their view that the option they recommend legally strengthens the Order from a litigation perspective if a court decides that NEPA does apply.

1. Whether the Executive Order should be based on NEPA as well as your constitutional power as President.

This issue was not one presented to the agencies for decision. State and CEQ both agreed in negotiations that the Order would refer to the purposes and policies of NEPA though they disagreed on the intent.

A number of agencies have objected to the present CEQ and State Department draft which can be read as basing the Executive Order on NEPA as well as your constitutional power. Deleting the reference to NEPA would make it clear that you are establishing a policy solely on the basis of your constitutional authority, as opposed to implementing NEPA. CEQ contends that including the reference to NEPA probably strengthens the Executive Order if in fact a court decides NEPA does apply; however, Justice advises that either option is acceptable.

-4-

CEQ believes that restricting NEPA to the "purpose and scope" and "procedures" section will (a) diminish the chances of solving the problem (government position on litigation to enforce NEPA) that brought this issue to the White House; (b) diminish the protection to agencies who are entitled to look on compliance with the Executive Order as compliance with NEPA; and (c) result in less consistent enforcement of the Order over the long run.

Decision:

Base the Executive Order on constitutional authority only (no reference to NEPA in the Preamble).

Approve ✓

(Recommended by: State, Treasury, DOD, STR, *Sta*
DOE, Commerce, Lipshutz)(NSC, CEA)

Disapprove

(Recommended by: CEQ, EPA)

2. Whether nuclear activities and exports, including nuclear fuel, other than reactors, should be exempt from the Order.

The State Department believes that application of the Order to nuclear fuel would severely damage the credibility of the United States as a reliable supplier and undermine your non-proliferation policy. State also believes the Order is an inappropriate device to address environmental problems associated with spent fuel, waste storage and waste disposal.

CEQ believes agencies should be informed of potential damage from these products and not to include all nuclear exports in the Order would generate serious doubts about the Order's effectiveness and would undermine the Administration's credibility with the environmental community. CEQ agrees to case-by-case exemptions from the Order for nuclear fuel to handle non-proliferation concerns (rather than across-the-board exemptions). CEQ believes that nuclear exports are one of the matters that most require this Order.

Decision:

Exempt nuclear exports except reactors.

-5-

Approve ✓

(Recommended by: State, Treasury, DOD, STR, *Shu*
OMB, DOE, Commerce, Ex-Im,
NRC, DOT, Lipshutz) (NSC, CEA)

Disapprove

(Recommended by: CEQ, Justice, EPA, Agriculture,
HEW, Interior)

3. Whether chemically hazardous products and facilities
producing these products should be covered by the Order.

One of the three agreed categories of the U. S. actions with effects in other countries that should have environmental reviews relates to hazardous substances banned or strictly regulated in the U. S.

The State Department wants coverage limited to toxic chemicals that are prohibited or strictly limited by Federal law in the U. S. to protect the environment against non-radiological hazards. Broader "products" or "projects" language is open ended and would include products or projects regulated by agencies such as EPA or OSHA.

CEQ wants coverage to include products and physical projects which are prohibited or strictly regulated by Federal law to protect against hazardous chemicals, e.g., pajamas treated with TRIS, as well as TRIS should be covered; plants that produce kepone as well as kepone should be covered.

Decision:

Include toxic products and projects producing toxic products as well as toxic chemicals themselves. 7

Approve ✓

(Recommended by: CEQ, DOT, EPA, Agriculture,
HEW, Esther Peterson, Justice,
Lipshutz)

Disapprove

(Recommended by: State, Treasury, DOE, DOD, *Shu*
Commerce, OMB, STR, Ex-Im) (NSC, CEA);

4. Whether the Order should include an option to prepare
an Environmental Impact Statement (EIS) in the cases of
(a) the environment of non-participating (bystander) third
countries and (b) nuclear and toxic chemical exports.

-6-

CEQ believes agencies should have the option of preparing an EIS and that an EIS may be legally required in some circumstances. The Order does provide for EIS's for actions affecting the global commons.

The State Department is concerned that even raising the possibility that the U. S. Government might prepare EIS's with respect to nuclear exports would create unacceptable uncertainties as to U. S. supply, and fears of intrusion, to the detriment of non-proliferation policy.

Justice advises that the CEQ position is preferable from the standpoint of defending potential lawsuits.

Decision:

Include in the Order an option to prepare an EIS.

Approve ☒

(Recommended by: CEQ, Agriculture, EPA, DOT,
Interior, Commerce, Justice,
Lipshutz)

Disapprove

(Recommended by: State, Treasury, DOE, Ex-Im, *Stu*
OMB, CEA, NRC, STR) (NSC)

5. Whether an agency should be required to notify other Federal agencies of the availability of documents prepared under the Order and if so whether the notification must take place prior to the proposed action.

The State Department wants to encourage but not mandate agency notification of the availability of documents. They believe that a notification requirement would bring about CEQ oversight and thus lead to disputes and delays incompatible with the conduct of foreign policy.

CEQ wants mandatory notification to agencies with expertise in the matter (with exceptions such as for foreign policy or national security reasons) in order to assure maximum agency coordination and exchange of information. Notification is an integral part of NEPA domestically and for EIS's involving the global commons.

Decision:

(1) Voluntary notification not necessarily prior to taking action.

Approve _____

(Recommended by: State, Treasury, DOT, Ex-Im,
DOD, STR, CEA, Commerce (exc.
global commons)

(2) Mandatory notification prior to taking action.

Approve _____

(Recommended by: CEQ, EPA, Agriculture,
Commerce (global commons),
Justice, OMB, HEW, Interior)

(3) Mandatory notification not necessarily prior to taking action.

Approve _____

(Recommended by: DOE, Lipshutz) (NSC)

6. Whether the Order should allow agencies to exempt actions from their procedures as well as modify documents.

Both agencies agree to a lengthy series of exemptions from the Order. The dispute turns on additional waivers of the Order.

The proposed Order already exempts from its requirements Presidential action, intelligence activities, arms transfers, certain national security or national interest action, export licenses and permits, votes and actions in international organizations and disaster and emergency relief actions and agencies are allowed to provide for categorical exclusions.

Agencies may modify the contents, timing and availability of the documents for a number of reasons including foreign policy, national security, international competition, degree of agency involvement and commercial confidentiality.

The State Department and CEQ believe it is impossible to foresee all situations in which preparation of a document could impact adversely. The State Department feels that the broadest flexibility is essential to protect foreign policy.

-8-

CEQ would allow "modifications" of documents, but would limit exceptions to special circumstances, such as emergencies or situations involving exceptional foreign policy sensitivities and then only after consultation with CEQ. CEQ asserts that to allow unchecked agency exemptions to the Order and the law renders both meaningless.

Justice urges Option 2 on the legal grounds that total flexibility for agencies substantially weakens the Order.

Decision:

(1) In addition to the agreed exemptions, allow agencies broad discretion to exempt actions as well as modify their procedures.

Approve _____

(Recommended by: State, Treasury, Ex-Im, CEA,
DOT, Commerce, NRC, DOE, STR) (NSC) :

(2) In addition to the agreed exemptions, allow agencies to modify but to exempt only in special circumstances, such as emergencies or situations involving exceptional foreign policy sensitivities and must consult with CEQ.

Approve _____ ✓

(Recommended by: CEQ, Agriculture, Justice,
EPA, OMB, Esther Peterson,
Lipshutz)

(3) However you decide between option 1 or 2, shall agencies consult with CEQ concerning the additional exemptions?

Consult with CEQ _____

No consultation with CEQ _____

7. How to limit the judicial review of the Order.

Both the State Department and CEQ do not wish this Order to create grounds for lawsuits. The State Department attempts to limit review not only of the Order but of the agency procedures pursuant to the Order. CEQ suggests language which would state only that there is no "new" cause of action.

Everyone agrees that the language in this section should attempt to limit or eliminate any litigation in this area. We and the Justice Department agree that by attempting to extend the protections of this provision to agency actions, we actually may defeat the purpose by going too far and therefore having the court reject this provision totally. The language we suggest would be:

This Order is solely for the purpose of establishing internal procedures for Federal agencies to consider the significant adverse effects of their actions on the environment outside the United States, its territories and possessions, and nothing in this Order shall be construed to create a cause of action.

Decision:

(1) This Order should state that neither the Order nor agency procedures required by the Order are judicially reviewable.

Agree _____

(Recommended by: State, Treasury, NRC, Ex-Im, *J.H. (clz)*
CEA, Commerce, OMB, STR)

(2) The Order should say it does not create any "new" grounds for lawsuits.

Agree _____

(Recommended by: CEQ, Agriculture, EPA)

(3) The Order should say it is solely for the purpose of establishing internal procedures and does not create a cause of action.

Agree _____

(Recommended by: DOD, Justice, Lipshutz) (NSC) *Shu*

THE CHAIRMAN OF THE
COUNCIL OF ECONOMIC ADVISERS
WASHINGTON

August 21, 1978

MEMORANDUM FOR THE PRESIDENT

FROM: Charlie Schultze (25) 17-100

Subject: Proposed Executive Order on the Environmental
Effects Abroad of Major Federal Actions

Bob Lipschutz has sent you a decision memo regarding this proposed Executive Order. My views on the potential economic dislocations associated with this order are well stated in Mike Blumenthal's memo to you for the EPG, and I will not reiterate them. I would like to make a few additional points, however.

The economic impact of the procedures called for under this proposed Executive Order depends to a substantial degree on interpretation by individual agencies of their responsibilities. A too-restrictive interpretation of our international environmental responsibilities could lead to lengthy delays and significant cost increases for U. S. firms that would divert business to foreign concerns. Since foreign competitors' technologies are not necessarily less damaging to the environment than those of U. S. firms, these adverse impacts on U. S. employment and economic activity would not necessarily be associated with any positive effect on the world's environment. For this reason, I strongly recommend that you decide to issue an Executive Order that minimizes costs to the economy consistent with legal requirements.

In this regard, I also believe that a key phrase contained in this order -- the term "global commons" -- should be carefully defined. In order to limit the impact of this order, State and CEQ have agreed that an EIS should be prepared only where an action would affect the "global commons". Nowhere has a definition of this term been provided, however.

"Global Commons" is not a term with a clearly-understood definition. I believe the order should make clear that the term should not be construed so broadly as to call, for example, for an EIS on a project that would pollute a river simply because the waters of that river ultimately would reach the open sea. In order to ensure that application of the order is kept to a relatively narrow set of circumstances, I believe the order should include a tight definition of "global commons," such as the following:

"The 'global commons' means the atmosphere, the ocean or those land masses (e.g., Antarctica) that are outside the territorial jurisdiction of any nation. An action significantly and adversely affects the environment of the global commons if it causes a significant emission to enter directly into the atmosphere, ocean, or a land mass outside the territorial jurisdiction of any nation."

Also, this memo does not reflect CEA's views on the first three decisions placed before you. I recommend that you:

-- Approve Decision 1, to base the Executive Order only on your constitutional authority.

-- Approve Decision 2, to exempt nuclear activities other than reactors from the Executive Order.

-- Disapprove Decision 3, to include under the order, toxic products and projects producing toxic products, as well as toxic chemicals themselves.

I also would like to clarify the very important issue raised in Decision 4. If you approve this decision, Government agencies would be able to require that an EIS be prepared for any action. If you disapprove, an EIS may be required only for actions adversely affecting either the global commons or natural resources designated for protection by the President or the Secretary of State. In the interest of limiting the coverage of the Order, I recommend that you disapprove decision 4.

IMM.
PRECEDENCE

Unclass
CLASSIFICATION

FROM: BILL SIMON
TO: Phil WISE

INFO:

(PLAINS)

RELEASED BY: GD

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DEX 1978 AUG 21 16 05

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SPECIAL INSTRUCTIONS:

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PM 4:35

WHITE HOUSE
SITUATION ROOM

THE WHITE HOUSE
WASHINGTON

August 21, 1978

TO: Phil Wise

FROM: Bill Simon *BS*

Attached is a REVISED version of the Stu/Bob memos on NEPA.

Additional staff comments have been added to this version of Bob's memo. I am also enclosing CEA's comments which should also be attached to the material.

Please call me after the President has reviewed this material.

Thank you very much.

THE WHITE HOUSE

WASHINGTON

August 19, 1978

MEMORANDUM FOR:

THE PRESIDENT

FROM:

STU EIZENSTAT *Stu*

SUBJECT: Proposed Executive Order on the
Environmental Effects Abroad of
Major Federal Actions

Bob Lipshutz was anxious that this memorandum reach you over the weekend, since Senator Stevenson's amendment to exempt the EXIM Bank from the application of the National Environmental Policy Act (NEPA) will be considered by the Congress this week. My understanding is that he has indicated a willingness to drop the amendment if our position on the issues presented is satisfactory. From my conversations with him, he strongly favors the State Department view of this matter.

The essence of this decision is the degree to which NEPA should be given what will be viewed as an extra-territorial impact. When this issue first surfaced many months ago in the context of a suit against the EXIM Bank to force the EXIM Bank to go through the procedure of developing an environmental impact statement on all projects which are financed abroad, it struck me as one of the most ridiculous interpretations of a statute possible. After months of following this issue and by attempting to resolve it through Executive Order, I remain strongly of the opinion that we should not require extra-territorial application of NEPA, except in limited situations dealing with "the global commons" -- that is the high seas and Antarctica.

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NEPA and would have serious adverse impacts on our ability to export and on the ability of the nuclear industry to survive and on the capability of the United States to be an assured supplier of nuclear fuel.

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On the fourth issue, I see no reason that agencies should be given the option to prepare environmental impact statements in the situations mentioned since this could create uncertainties.

On the fifth point, I do not think we should create a situation with CEQ oversight and would, therefore, favor the first of the three options, although I would have no strong objection to mandatory notification after taking of the action, the third option.

On the sixth point, I agree with the CEQ recommendation to somewhat limit the flexibility of agencies to further exempt their activities (option 2).

On the seventh issue, I agree with Bob Lipshutz' recommendation for option three, although I would view option 1 as also acceptable.

THE WHITE HOUSE

WASHINGTON

August 18, 1978

MEMORANDUM FOR THE PRESIDENT

FROM: ROBERT LIPSHUTZ
MARGARET MCKENNA

RL
MM

SUBJECT: Proposed Executive Order on the
Environmental Effects Abroad of
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CEQ believes that restricting NEPA to the "purpose and scope" and "procedures" section will (a) diminish the chances of solving the problem (government position on litigation to enforce NEPA) that brought this issue to the White House; (b) diminish the protection to agencies who are entitled to look on compliance with the Executive Order as compliance with NEPA; and (c) result in less consistent enforcement of the Order over the long run.

Decision:

Base the Executive Order on constitutional authority only (no reference to NEPA in the Preamble).

Approve _____

(Recommended by: State, Treasury, DOD, STR,
DOE, Commerce, Lipshutz)(NSC, CEA)

Disapprove _____

(Recommended by: CEQ, EPA)

2. Whether nuclear activities and exports, including nuclear fuel, other than reactors, should be exempt from the Order.

The State Department believes that application of the Order to nuclear fuel would severely damage the credibility of the United States as a reliable supplier and undermine your non-proliferation policy. State also believes the Order is an inappropriate device to address environmental problems associated with spent fuel, waste storage and waste disposal.

CEQ believes agencies should be informed of potential damage from these products and not to include all nuclear exports in the Order would generate serious doubts about the Order's effectiveness and would undermine the Administration's credibility with the environmental community. CEQ agrees to case-by-case exemptions from the Order for nuclear fuel to handle non-proliferation concerns (rather than across-the-board exemptions). CEQ believes that nuclear exports are one of the matters that most require this Order.

Decision:

Exempt nuclear exports except reactors.

Approve _____

(REcommended by: State, Treasury, DOD, STR,
OMB, DOE, Commerce, Ex-Im,
NRC, DOT, Lipshutz) (NSC, CEA)

Disapprove _____

(Recommended by: CEQ, Justice, EPA, Agriculture,
HEW, Interior)

3. Whether chemically hazardous products and facilities producing these products should be covered by the Order.

One of the three agreed categories of the U. S. actions with effects in other countries that should have environmental reviews relates to hazardous substances banned or strictly regulated in the U. S.

The State Department wants coverage limited to toxic chemicals that are prohibited or strictly limited by Federal law in the U. S. to protect the environment against non-radiological hazards. Broader "products" or "projects" language is open ended and would include products or projects regulated by agencies such as EPA or OSHA.

CEQ wants coverage to include products and physical projects which are prohibited or strictly regulated by Federal law to protect against hazardous chemicals, e.g., pajamas treated with TRIS, as well as TRIS should be covered; plants that produce kepone as well as kepone should be covered.

Decision:

Include toxic products and projects producing toxic products as well as toxic chemicals themselves.

Approve _____

(Recommended by: CEQ, DOT, EPA, Agriculture,
HEW, Esther Peterson, Justice,
Lipshutz)

Disapprove _____

(Recommended by: State, Treasury, DOE, DOD,
Commerce, OMB, STR, Ex-Im) (NSC, CEA)

4. Whether the Order should include an option to prepare an Environmental Impact Statement (EIS) in the cases of (a) the environment of non-participating (bystander) third countries and (b) nuclear and toxic chemical exports.

CEQ believes agencies should have the option of preparing an EIS and that an EIS may be legally required in some circumstances. The Order does provide for EIS's for actions affecting the global commons.

The State Department is concerned that even raising the possibility that the U. S. Government might prepare EIS's with respect to nuclear exports would create unacceptable uncertainties as to U. S. supply, and fears of intrusion, to the detriment of non-proliferation policy.

Justice advises that the CEQ position is preferable from the standpoint of defending potential lawsuits.

Decision:

Include in the Order an option to prepare an EIS.

Approve _____

(Recommended by: CEQ, Agriculture, EPA, DOT,
Interior, Commerce, Justice,
Lipshutz)

Disapprove _____

(Recommended by: State, Treasury, DOE, Ex-Im,
OMB, CEA, NRC, STR) (NSC)

5. Whether an agency should be required to notify other Federal agencies of the availability of documents prepared under the Order and if so whether the notification must take place prior to the proposed action.

The State Department wants to encourage but not mandate agency notification of the availability of documents. They believe that a notification requirement would bring about CEQ oversight and thus lead to disputes and delays incompatible with the conduct of foreign policy.

CEQ wants mandatory notification to agencies with expertise in the matter (with exceptions such as for foreign policy or national security reasons) in order to assure maximum agency coordination and exchange of information. Notification is an integral part of NEPA domestically and for EIS's involving the global commons.

Decision:

(1) Voluntary notification not necessarily prior to taking action.

Approve

(Recommended by: State, Treasury, DOT, Ex-Im, DOD, STR, CEA, Commerce (exc. global commons))

(2) Mandatory notification prior to taking action.

Approve

(Recommended by: CEQ, EPA, Agriculture, Commerce (global commons), Justice, OMB, HEW, Interior)

(3) Mandatory notification not necessarily prior to taking action.

Approve

(Recommended by: DOE, Lipshutz) (NSC)

6. Whether the Order should allow agencies to exempt actions from their procedures as well as modify documents.

Both agencies agree to a lengthy series of exemptions from the Order. The dispute turns on additional waivers of the Order.

The proposed Order already exempts from its requirements Presidential action, intelligence activities, arms transfers, certain national security or national interest action, export licenses and permits, votes and actions in international organizations and disaster and emergency relief actions and agencies are allowed to provide for categorical exclusions.

Agencies may modify the contents, timing and availability of the documents for a number of reasons including foreign policy, national security, international competition, degree of agency involvement and commercial confidentiality.

The State Department and CEQ believe it is impossible to foresee all situations in which preparation of a document could impact adversely. The State Department feels that the broadest flexibility is essential to protect foreign policy.

CEQ would allow "modifications" of documents, but would limit exceptions to special circumstances, such as emergencies or situations involving exceptional foreign policy sensitivities and then only after consultation with CEQ. CEQ asserts that to allow unchecked agency exemptions to the Order and the law renders both meaningless.

Justice urges Option 2 on the legal grounds that total flexibility for agencies substantially weakens the Order.

Decision:

(1) In addition to the agreed exemptions, allow agencies broad discretion to exempt actions as well as modify their procedures.

Approve _____

(Recommended by: State, Treasury, Ex-Im, CEA,
DOT, Commerce, NRC, DOE, STR) (NSC)

(2) In addition to the agreed exemptions, allow agencies to modify but to exempt only in special circumstances, such as emergencies or situations involving exceptional foreign policy sensitivities and must consult with CEQ.

Approve _____

(Recommended by: CEQ, Agriculture, Justice,
EPA, OMB, Esther Peterson,
Lipshutz)

(3) However you decide between option 1 or 2, shall agencies consult with CEQ concerning the additional exemptions?

Consult with CEQ _____

No consultation with CEQ _____

7. How to limit the judicial review of the Order.

Both the State Department and CEQ do not wish this Order to create grounds for lawsuits. The State Department attempts to limit review not only of the Order but of the agency procedures pursuant to the Order. CEQ suggests language which would state only that there is no "new" cause of action.

Everyone agrees that the language in this section should attempt to limit or eliminate any litigation in this area. We and the Justice Department agree that by attempting to extend the protections of this provision to agency actions, we actually may defeat the purpose by going too far and therefore having the court reject this provision totally. The language we suggest would be:

This Order is solely for the purpose of establishing internal procedures for Federal agencies to consider the significant adverse effects of their actions on the environment outside the United States, its territories and possessions, and nothing in this Order shall be construed to create a cause of action.

Decision:

(1) This Order should state that neither the Order nor agency procedures required by the Order are judicially reviewable.

Agree _____

(Recommended by: State, Treasury, NRC, Ex-Im, CEA, Commerce, OMB, STR)

(2) The Order should say it does not create any "new" grounds for lawsuits.

Agree _____

(Recommended by: CEQ, Agriculture, EPA)

(3) The Order should say it is solely for the purpose of establishing internal procedures and does not create a cause of action.

Agree _____

(Recommended by: DOD, Justice, Lipshutz) (NSC)

THE CHAIRMAN OF THE
COUNCIL OF ECONOMIC ADVISERS
WASHINGTON

August 21, 1978

MEMORANDUM FOR THE PRESIDENT

FROM: Charlie Schultze *CLS by ASD*

Subject: Proposed Executive Order on the Environmental
Effects Abroad of Major Federal Actions

Bob Lipschutz has sent you a decision memo regarding this proposed Executive Order. My views on the potential economic dislocations associated with this order are well stated in Mike Blumenthal's memo to you for the EPG, and I will not reiterate them. I would like to make a few additional points, however.

The economic impact of the procedures called for under this proposed Executive Order depends to a substantial degree on interpretation by individual agencies of their responsibilities. A too-restrictive interpretation of our international environmental responsibilities could lead to lengthy delays and significant cost increases for U. S. firms that would divert business to foreign concerns. Since foreign competitors' technologies are not necessarily less damaging to the environment than those of U. S. firms, these adverse impacts on U. S. employment and economic activity would not necessarily be associated with any positive effect on the world's environment. For this reason, I strongly recommend that you decide to issue an Executive Order that minimizes costs to the economy consistent with legal requirements.

In this regard, I also believe that a key phrase contained in this order -- the term "global commons" -- should be carefully defined. In order to limit the impact of this order, State and CEQ have agreed that an EIS should be prepared only where an action would affect the "global commons". Nowhere has a definition of this term been provided, however.

"Global Commons" is not a term with a clearly-understood definition. I believe the order should make clear that the term should not be construed so broadly as to call, for example, for an EIS on a project that would pollute a river simply because the waters of that river ultimately would reach the open sea. In order to ensure that application of the order is kept to a relatively narrow set of circumstances, I believe the order should include a tight definition of "global commons," such as the following:

"The 'global commons' means the atmosphere, the ocean or those land masses (e.g., Antarctica) that are outside the territorial jurisdiction of any nation. An action significantly and adversely affects the environment of the global commons if it causes a significant emission to enter directly into the atmosphere, ocean, or a land mass outside the territorial jurisdiction of any nation."

Also, this memo does not reflect CEA's views on the first three decisions placed before you. I recommend that you:

-- Approve Decision 1, to base the Executive Order only on your constitutional authority.

-- Approve Decision 2, to exempt nuclear activities other than reactors from the Executive Order.

-- Disapprove Decision 3, to include under the order, toxic products and projects producing toxic products, as well as toxic chemicals themselves.

I also would like to clarify the very important issue raised in Decision 4. If you approve this decision, Government agencies would be able to require that an EIS be prepared for any action. If you disapprove, an EIS may be required only for actions adversely affecting either the global commons or natural resources designated for protection by the President or the Secretary of State. In the interest of limiting the coverage of the Order, I recommend that you disapprove decision 4.

THE WHITE HOUSE

WASHINGTON

ACTION

August 18, 1978

MEMORANDUM FOR:

THE PRESIDENT

FROM:

ZBIGNIEW BRZEZINSKI *25.*

SUBJECT:

Proposed Executive Order on the
Environmental Effects Abroad of
Major Federal Actions

Given the extreme divisiveness of this issue within the Administration, as well as the current weakness of the dollar and US trade deficit (as described by Mike Blumenthal in the EPG memorandum), I can support Bob's treatment of this issue, though you should be aware that the central legal question of whether NEPA applies extraterritorially is left hanging. As to the seven specific issues, I recommend the following:

- Issue 1 -- Approve. This will limit the bases for the litigation.
- Issue 2 -- Approve. To do otherwise will severely damage our credibility as a reliable supplier and therefore our non-proliferation policy.
- Issue 3 -- Disapprove. There is enough disagreement about OSHA-type regulation in this country -- let us not try to impose it abroad.
- Issue 4 -- Disapprove. I agree with State that raising the specter of litigation would damage our non-proliferation policy.
- Issue 5 -- Option 3. This compromise option adequately meets State's concerns over unnecessary delay.
- Issue 6 -- Option 1; no consultation with CEQ. There will be cases where this kind of flexibility may be essential.
- Issue 7 -- Option 3. Justice's language is clear and simple. It says what needs to be said to afford the maximum protection.

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
722 JACKSON PLACE, N. W.
WASHINGTON, D. C. 20006

August 18, 1978

MEMORANDUM FOR RICK HUTCHESON

FROM: Charles Warren



Enclosed is a CEQ memorandum for the President dealing with an issue -- the application of the National Environmental Policy Act to agency actions which adversely impact the environment outside the U.S. -- which has been the subject of an intense interagency debate for several months. CEQ has been the principal agency on one side of the debate. It is essential that this memorandum go to the President at the time at which he is provided with other materials on this subject.

Enclosure

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
722 JACKSON PLACE, N. W.
WASHINGTON, D. C. 20006

August 17, 1978

MEMORANDUM FOR THE PRESIDENT

FROM: CHARLES WARREN *Charles Warren*

SUBJECT: Proposed Executive Order on the Environmental Effects
Abroad of Major Federal Actions

Today you will receive a memorandum from Bob Lipshutz concerning a proposed Executive Order on the Environmental Effects Abroad of Major Federal Actions. We believe the memorandum does not fully inform you of the legal nature of the subject or the historic moment of the issues now before you.

Federal agencies take many actions every year which can and do dramatically impact on the quality of the environment outside the United States. Yet, unfortunately, the level of environmental awareness of those taking these actions is low. At the same time, as our Global 2000 study will indicate, many aspects of the global environment are deteriorating rapidly, and the future promises a series of problems of possibly crisis proportions.

Those who have been concerned about the environment abroad believe that the National Environmental Policy Act holds part of the answer. The environmental community in and outside government have urged for several years that this law applies to U.S. actions abroad and requires that, consistent with foreign policy considerations, federal agencies prepare at least brief analyses of the environmental impacts abroad of their proposed actions.

The question before you is whether the executive order will establish a strong, credible program worthy of this Administration. In this regard, you should be aware that most members of the environmental community feel that CEQ has already gone too far in trying to seek an accommodation with State and other agencies. This is reflected in the recent letters to you from the major environmental organizations and Senator Muskie.

The issue involved -- whether and how the National Environmental Policy Act applies to major federal actions abroad -- is in large part a legal question, yet Bob's memorandum for the most part presents the issue as if only policy considerations were involved. The Department of Justice, Office of Legal Counsel (Assistant Attorney General Harmon) has analyzed the legal defensibility of the Order and has issued a written opinion to the White House which gives specific legal guidance on the defensibility of the Order as a whole and on each option presented to you. CEQ has reviewed Justice's opinion memorandum. It supports our position on the issues still outstanding with State.

We are aware and appreciate that numerous federal agencies do not wish to be responsible for considering environmental consequences of their actions abroad and can recite a host of exaggerated fears and concerns if they are required to do so. But such recitations obscure both the fact that the issue before you involves legal requirements and the compelling policy considerations which demand a heightened awareness of the environment outside the U.S.

In our negotiations with State, CEQ attempted to provide agencies with maximum flexibility in a manner consistent with the minimum requirements of the Act. Many have suggested that the flexibility permitted is excessive. Frankly, Mr. President, even if you decide the remaining issues in a manner recommended by us, we believe there is a substantial risk that the order will not suffice as a defense to any lawsuit to compel compliance with NEPA; if the issues are decided as State recommends we believe that risk becomes a certainty.

THE WHITE HOUSE

WASHINGTON

August 19, 1978

MEMORANDUM FOR:

THE PRESIDENT

FROM:

STU EIZENSTAT *Stu*

SUBJECT: Proposed Executive Order on the
Environmental Effects Abroad of
Major Federal Actions

Bob Lipshutz was anxious that this memorandum reach you over the weekend, since Senator Stevenson's amendment to exempt the EXIM Bank from the application of the National Environmental Policy Act (NEPA) will be considered by the Congress this week. My understanding is that he has indicated a willingness to drop the amendment if our position on the issues presented is satisfactory. From my conversations with him, he strongly favors the State Department view of this matter.

The essence of this decision is the degree to which NEPA should be given what will be viewed as an extra-territorial impact. When this issue first surfaced many months ago in the context of a suit against the EXIM Bank to force the EXIM Bank to go through the procedure of developing an environmental impact statement on all projects which are financed abroad, it struck me as one of the most ridiculous interpretations of a statute possible. After months of following this issue and by attempting to resolve it through Executive Order, I remain strongly of the opinion that we should not require extra-territorial application of NEPA, except in limited situations dealing with "the global commons" -- that is the high seas and Antarctica.

This country has no business blocking a project in a foreign country which is perfectly permissible and legal in that country simply because the project would violate our environmental rules if it were built in the United States; nor should there be any impediment to such a project except in the most unusual circumstances.

While this is an issue on which the environmental community feels strongly, to impose environmental reviews on our foreign affairs and export activities would be a misapplication of

NEPA and would have serious adverse impacts on our ability to export and on the ability of the nuclear industry to survive and on the capability of the United States to be an assured supplier of nuclear fuel.

While considerable progress has been made over the last few months in resolving many outstanding issues, the positions taken by CEQ on the remaining issues before you will add to paperwork and Administrative complexity, are potentially inflationary, and will send a strong signal that we are going to add additional impediments to exports at the very time that we have developed an export policy to reduce those impediments.

Thus, in virtually every instance, I support the position taken by State, Treasury, Commerce, STR, and the EXIM Bank. Therefore, on the first decision, I believe the Executive Order should rest on constitutional authority only rather than on interpretation of NEPA. On the second issue, I think it is critically important to exempt nuclear exports, including nuclear fuel, with the exception of reactors, from the order so that our non-proliferation policy is strengthened and the United States is viewed as a reliable supplier of nuclear fuel. On the third issue, we should cover by the Executive Order toxic chemicals which are prohibited or strictly limited by Federal law in the United States, but should not go along with the CEQ recommendation for a broader list of products. This might create a bureaucratic nightmare in terms of the number of potential products.

On the fourth issue, I see no reason that agencies should be given the option to prepare environmental impact statements in the situations mentioned since this could create uncertainties.

On the fifth point, I do not think we should create a situation with CEQ oversight and would, therefore, favor the first of the three options, although I would have no strong objection to mandatory notification after taking of the action, the third option.

On the sixth point, I agree with the CEQ recommendation to somewhat limit the flexibility of agencies to further exempt their activities (option 2).

On the seventh issue, I agree with Bob Lipshutz' recommendation for option three, although I would view option 1 as also acceptable.

THE WHITE HOUSE

WASHINGTON

August 19, 1978

MEMORANDUM FOR:

THE PRESIDENT

FROM:

STU EIZENSTAT *Stu*

SUBJECT: Proposed Executive Order on the
Environmental Effects Abroad of
Major Federal Actions

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This country has no business blocking a project in a foreign country which is perfectly permissible and legal in that country simply because the project would violate our environmental rules if it were built in the United States; nor should there be any impediment to such a project except in the most unusual circumstances.

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On the seventh issue, I agree with Bob Lipshutz' recommendation for option three, although I would view option 1 as also acceptable.

THE WHITE HOUSE

WASHINGTON

August 18, 1978

MEMORANDUM FOR THE PRESIDENT

FROM: ROBERT LIPSHUTZ *RL*
MARGARET MCKENNA *MM*

SUBJECT: Proposed Executive Order on the
Environmental Effects Abroad of
Major Federal Actions

Since the National Environmental Policy Act (NEPA) was enacted in 1969, there has been an unresolved issue whether the Act applies to environmental effects outside the United States of major Federal actions. The Council on Environmental Quality (CEQ) and the Environmental Protection Agency (EPA) maintain that the Act does so apply. State, Defense, Treasury, the Export-Import Bank, and the other agencies concerned with foreign affairs and foreign "economic" policy maintain that it does not or that it applies only in a limited way. Up to now no Administration has attempted to resolve the issue. Generally the agencies have not prepared an environmental impact statement (EIS) with respect to impacts in foreign jurisdictions; some agencies prepare statements with respect to the global commons (e.g., oceans, Antarctica).

The issue has been brought to a head this year by lawsuits brought against the Ex-Im Bank and the State Department seeking to require preparation of EIS's on environmental effects outside the United States; by regulations proposed by CEQ to require agencies to prepare documents as to impacts abroad (which met with strong opposition from agencies); and by an amendment to the Ex-Im Bank's Authorization Act proposed by Senator Stevenson to exempt the Bank from NEPA. The issue is highly divisive within the Administration and the Congress because of the important environmental, economic, foreign policy and national security implications. Those who support

environmental review of foreign affairs activities argue that it is necessary to protect the human environment. They point to increasing global environmental problems and to incidents where U. S. assisted efforts have caused unintended environmental degradation (including effects on neighboring countries) and where hazardous chemicals or facilities banned in the U. S. are exported. Senator Muskie and Congressmen Dingell and Leggett believe that, although in certain instances even the CEQ version is too weak, the State Department alternatives are substantially less than the law requires and urge you to support the CEQ version. The agencies that oppose such reviews argue that preparation of environmental documents on foreign impacts would strain our relations with other countries, damage promotion of U. S. exports, make it more difficult to redress the \$30 billion U. S. trade deficit, and undermine important U. S. foreign policy and national security policy objectives, including particularly the Administration's efforts to restrain proliferation of nuclear weapons.

To deal with this situation, we have encouraged CEQ and the Department of State to endeavor to negotiate a proposed Executive Order that would enable agencies to take foreign environmental effects of their actions into account consistent with U. S. economic, foreign policy, and national security interests. The basic concept is to find a practical approach which would avoid a direct resolution of the legal issue. After several months of intense effort, CEQ and State have agreed on the terms of an Executive Order except for a few issues which require your decision.

The basic scheme of the Executive Order is to direct the agencies to develop within eight months their own procedures for taking environmental considerations into account in accordance with the terms of the Order. For major Federal actions having significant effects in the global commons areas, the Executive Order would provide for the same kind of environmental reviews (i.e., EIS's) that agencies must conduct under NEPA in domestic cases.

The Order identifies environmental effects that should be taken into consideration, gives agencies the option of using one of three types of environmental review documents (two under State's version), details what Federal actions are exempt from the Order and the

considerations that agencies may take into account in establishing exceptions and modifications to their procedures.

The result of the Order would be the first systematic United States Government program to take into consideration environmental impacts in foreign countries. While several agencies have expressed concern over issuing an Order now because of possible impact on our fluctuating foreign exchange market, we believe the Order has adequately met the concerns of the economic community. CEQ wants you to know that it and the environmental community believes that CEQ's version is barely acceptable and that State's version is anti-environmental. It is important to resolve this issue now in order to avoid a court imposed resolution (there is a lawsuit pending on this issue), or a legislatively imposed resolution. (The Stevenson amendment, to be acted upon next week, would exempt Ex-Im Bank from NEPA.)

CEQ and the State Department have reached agreement on most areas of the Executive Order. The following issues remain and are presented for your decision.

In a legal memorandum to us, the Justice Department advised us of their position on each of the seven issues. It reflects their view that the option they recommend legally strengthens the Order from a litigation perspective if a court decides that NEPA does apply.

1. Whether the Executive Order should be based on NEPA as well as your constitutional power as President.

This issue was not one presented to the agencies for decision. State and CEQ both agreed in negotiations that the Order would refer to the purposes and policies of NEPA though they disagreed on the intent.

A number of agencies have objected to the present CEQ and State Department draft which can be read as basing the Executive Order on NEPA as well as your constitutional power. Deleting the reference to NEPA would make it clear that you are establishing a policy solely on the basis of your constitutional authority, as opposed to implementing NEPA. CEQ contends that including the reference to NEPA probably strengthens the Executive Order if in fact a court decides NEPA does apply; however, Justice advises that either option is acceptable.

-4-

CEQ believes that restricting NEPA to the "purpose and scope" and "procedures" section will (a) diminish the chances of solving the problem (government position on litigation to enforce NEPA) that brought this issue to the White House; (b) diminish the protection to agencies who are entitled to look on compliance with the Executive Order as compliance with NEPA; and (c) result in less consistent enforcement of the Order over the long run.

Decision:

Base the Executive Order on constitutional authority only (no reference to NEPA in the Preamble).

Approve _____

(Recommended by: State, Treasury, DOD, STR,
DOE, Commerce, Lipshutz) USC, CEA

Disapprove _____

(Recommended by: CEQ, EPA)

2. Whether nuclear activities and exports, including nuclear fuel, other than reactors, should be exempt from the Order.

The State Department believes that application of the Order to nuclear fuel would severely damage the credibility of the United States as a reliable supplier and undermine your non-proliferation policy. State also believes the Order is an inappropriate device to address environmental problems associated with spent fuel, waste storage and waste disposal.

CEQ believes agencies should be informed of potential damage from these products and not to include all nuclear exports in the Order would generate serious doubts about the Order's effectiveness and would undermine the Administration's credibility with the environmental community. CEQ agrees to case-by-case exemptions from the Order for nuclear fuel to handle non-proliferation concerns (rather than across-the-board exemptions). CEQ believes that nuclear exports are one of the matters that most require this Order.

Decision:

Exempt nuclear exports except reactors.

-5-

Approve

(Recommended by: State, Treasury, DOD, STR,
OMB, DOE, Commerce, Ex-Im,
NRC, DOT, Lipshutz) NSC, CSA

Disapprove

(Recommended by: CEQ, Justice, EPA, Agriculture,
HEW, Interior)

3. Whether chemically hazardous products and facilities
producing these products should be covered by the Order.

One of the three agreed categories of the U. S. actions
with effects in other countries that should have environ-
mental reviews relates to hazardous substances banned
or strictly regulated in the U. S.

The State Department wants coverage limited to toxic
chemicals that are prohibited or strictly limited by
Federal law in the U. S. to protect the environment
against non-radiological hazards. Broader "products"
or "projects" language is open ended and would include
products or projects regulated by agencies such as
EPA or OSHA.

CEQ wants coverage to include products and physical
projects which are prohibited or strictly regulated by
Federal law to protect against hazardous chemicals,
e.g., pajamas treated with TRIS, as well as TRIS should
be covered; plants that produce kepone as well as kepone
should be covered.

Decision:

Include toxic products and projects producing
toxic products as well as toxic chemicals themselves.

Approve

(Recommended by: CEQ, DOT, EPA, Agriculture,
HEW, Esther Peterson, Justice,
Lipshutz)

Disapprove

(Recommended by: State, Treasury, DOE, DOD,
Commerce, OMB, STR, Ex-Im) NSC
CSA

4. Whether the Order should include an option to prepare
an Environmental Impact Statement (EIS) in the cases of
(a) the environment of non-participating (bystander) third
countries and (b) nuclear and toxic chemical exports.

-6-

CEQ believes agencies should have the option of preparing an EIS and that an EIS may be legally required in some circumstances. The Order does provide for EIS's for actions affecting the global commons.

The State Department is concerned that even raising the possibility that the U. S. Government might prepare EIS's with respect to nuclear exports would create unacceptable uncertainties as to U. S. supply, and fears of intrusion, to the detriment of non-proliferation policy.

Justice advises that the CEQ position is preferable from the standpoint of defending potential lawsuits.

Decision:

Include in the Order an option to prepare an EIS.

Approve

(Recommended by: CEQ, Agriculture, EPA, DOT, Interior, Commerce, Justice, Lipshutz)

Disapprove

(Recommended by: State, Treasury, DOE, Ex-Im, OMB, CEA, NRC, STR) *USC*

5. Whether an agency should be required to notify other Federal agencies of the availability of documents prepared under the Order and if so whether the notification must take place prior to the proposed action.

The State Department wants to encourage but not mandate agency notification of the availability of documents. They believe that a notification requirement would bring about CEQ oversight and thus lead to disputes and delays incompatible with the conduct of foreign policy.

CEQ wants mandatory notification to agencies with expertise in the matter (with exceptions such as for foreign policy or national security reasons) in order to assure maximum agency coordination and exchange of information. Notification is an integral part of NEPA domestically and for EIS's involving the global commons.

Decision:

-7-

(1) Voluntary notification not necessarily prior to taking action.

Approve _____

(Recommended by: State, Treasury, DOT, Ex-Im,
DOD, STR, CEA, Commerce (exc.
global commons)

(2) Mandatory notification prior to taking action.

Approve _____

(Recommended by: CEQ, EPA, Agriculture,
Commerce (global commons),
Justice, OMB, HEW, Interior)

(3) Mandatory notification not necessarily prior to taking action.

Approve _____

(Recommended by: DOE, Lipshutz) NSC

6. Whether the Order should allow agencies to exempt actions from their procedures as well as modify documents.

Both agencies agree to a lengthy series of exemptions from the Order. The dispute turns on additional waivers of the Order.

The proposed Order already exempts from its requirements Presidential action, intelligence activities, arms transfers, certain national security or national interest action, export licenses and permits, votes and actions in international organizations and disaster and emergency relief actions and agencies are allowed to provide for categorical exclusions.

Agencies may modify the contents, timing and availability of the documents for a number of reasons including foreign policy, national security, international competition, degree of agency involvement and commercial confidentiality.

The State Department and CEQ believe it is impossible to foresee all situations in which preparation of a document could impact adversely. The State Department feels that the broadest flexibility is essential to protect foreign policy.

-8-

CEQ would allow "modifications" of documents, but would limit exceptions to special circumstances, such as emergencies or situations involving exceptional foreign policy sensitivities and then only after consultation with CEQ. CEQ asserts that to allow unchecked agency exemptions to the Order and the law renders both meaningless.

Justice urges Option 2 on the legal grounds that total flexibility for agencies substantially weakens the Order.

Decision:

(1) In addition to the agreed exemptions, allow agencies broad discretion to exempt actions as well as modify their procedures.

Approve _____

(Recommended by: State, Treasury, Ex-Im, CEA,
DOT, Commerce, NRC, DOE, STR) *NSC*

(2) In addition to the agreed exemptions, allow agencies to modify but to exempt only in special circumstances, such as emergencies or situations involving exceptional foreign policy sensitivities and must consult with CEQ.

Approve _____

(Recommended by: CEQ, Agriculture, Justice,
EPA, OMB, Esther Peterson,
Lipshutz)

(3) However you decide between option 1 or 2, shall agencies consult with CEQ concerning the additional exemptions?

Consult with CEQ _____

No consultation with CEQ _____

7. How to limit the judicial review of the Order.

Both the State Department and CEQ do not wish this Order to create grounds for lawsuits. The State Department attempts to limit review not only of the Order but of the agency procedures pursuant to the Order. CEQ suggests language which would state only that there is no "new" cause of action.

Everyone agrees that the language in this section should attempt to limit or eliminate any litigation in this area. We and the Justice Department agree that by attempting to extend the protections of this provision to agency actions, we actually may defeat the purpose by going too far and therefore having the court reject this provision totally. The language we suggest would be:

This Order is solely for the purpose of establishing internal procedures for Federal agencies to consider the significant adverse effects of their actions on the environment outside the United States, its territories and possessions, and nothing in this Order shall be construed to create a cause of action.

Decision:

(1) This Order should state that neither the Order nor agency procedures required by the Order are judicially reviewable.

Agree _____
(Recommended by: State, Treasury, NRC, Ex-Im,
CEA, Commerce, OMB, STR)

(2) The Order should say it does not create any "new" grounds for lawsuits.

Agree _____
(Recommended by: CEQ, Agriculture, EPA)

(3) The Order should say it is solely for the purpose of establishing internal procedures and does not create a cause of action.

Agree _____
(Recommended by: DOD, Justice, Lipshutz) WSC

THE SECRETARY OF STATE
WASHINGTON

August 18, 1978

MEMORANDUM FOR: THE PRESIDENT
FROM: Cyrus Vance *CV*
SUBJECT: Proposed Executive Order on Environmental
Effects Abroad of Major Federal Actions

On behalf of Harold Brown, Zbig, Mike Blumenthal, Juanita Kreps, Jim Schlesinger and Bob Strauss and myself, I wish to give you our recommendations concerning the issues Bob Lipshutz is submitting to you.

Bob's paper asks you to resolve several issues between the views of the State Department, supported by the other agencies that are concerned with foreign, national security and economic affairs, and those of CEO, on behalf of the environmental community. The lawyers are deeply split on the legal issues: although Justice is sympathetic to the environmental position, all the lawyers for the agencies for whom I am speaking support the State position. Bob's views are in his paper. As reasonable legal arguments can be made on both sides, you are free to make your decisions on policy grounds.

This would be a most unfortunate time to have to impose environmental reviews on our foreign affairs and export activities. Such a move would adversely affect foreign and business perceptions of our commitments to support the dollar, redress balance of payments deficits, promote exports and pursue worldwide nuclear non-proliferation initiatives.

The Executive Order which State has proposed makes adequate accommodation to worldwide environmental protective constraints on our foreign affairs agencies. We urge its approval.



United States Department of Justice

OFFICE OF THE ASSOCIATE ATTORNEY GENERAL

WASHINGTON, D.C. 20530

MEMORANDUM FOR THE HONORABLE ROBERT J. LIPSHUTZ
Counsel to the President

Re: Proposed Executive Order "Environmental
Effects Abroad of Major Federal Actions."

This responds to your request for a statement of the general position the Department of Justice will take in litigation brought under the National Environmental Policy Act (NEPA), challenging agency action taken pursuant to the proposed Executive Order "Environmental Effects Abroad of Major Federal Actions." We will respond to four separate questions about our litigating position.

1. Is the Department willing to defend the Executive Order's failure to require impact statements for agency actions which have solely foreign impacts? If the President signs the Executive Order, the Department is prepared to take the position that § 102(2)(C) of NEPA does not require the preparation of an environmental impact statement where agency actions abroad do not have a significant effect on the United States environment or the global commons. Our ability successfully to defend agency decisions not to proceed with § 102(2)(C) environmental impact statements will in most cases depend on the documentation of the agency's threshold determination that there will be no significant impact on the United States environment or the global commons. While those determinations in some cases may be made on a generic or categorical basis, the threshold determination will be essential to a successful defense.

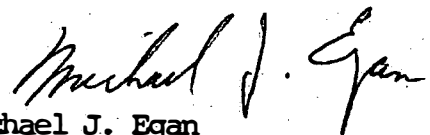
2. What position will the Department take with respect to actions which have both foreign and domestic impacts? With regard to agency actions outside the United States which have a significant impact on the United States as well as foreign environment, the legislative history of the statute and present administrative practice indicate that § 102(2)(C) does apply and that impact statements will be required.

3. What position will the Department take with respect to the global commons issue? As the Executive Order requires agencies to prepare environmental impact statements for agency actions significantly affecting the global commons, we are ready to argue that such impact statements constitute full compliance with NEPA whether or not § 102(2)(C) demands such action under these circumstances.

4. What is the Department's position regarding the applicability of NEPA to national defense and foreign affairs? Even where government action has a significant effect on the United States environment or the global commons, we take the position that neither § 102(2)(C) or any other part of NEPA can impede the ability of the President and those charged by him with the responsibility of carrying out his policies and decisions to effectively and successfully provide the national defense and the conduct of foreign affairs of this country. NEPA cannot be used by litigants to alter or delay actions within the prerogative of the President in the areas of national security and foreign affairs. The Department of Justice will always defend the President's ability to perform his constitutional responsibilities in the defense of our national security or the conduct of our foreign affairs. NEPA was not intended, nor can it be interpreted or applied, to interfere with the government's ability to function effectively in these essential and constitutionally special areas.

5. What response will the Department make to claims that the Order creates a right of action to challenge agency actions with solely foreign impacts? We will take the position that neither the Executive Order, nor § 102(2)(C) nor any other section of NEPA gives rise to any cause of action to challenge specific agency actions which do not significantly impact the United States environment or the global commons. As in all other areas, the Department will make decisions regarding litigation challenging particular agency actions consistent with its obligation to represent the interests of the government as a whole, and not only the particular interests of individual agencies.

We will provide by separate memorandum several specific comments and recommendations from the litigator's viewpoint regarding the particular provisions of the proposed Executive Order.



Michael J. Egan
Associate Attorney General

8/16/78

Department
of the Treasury

to. Mr. Rick Hutcheson

Office
of the Secretary

Rick -

Attached is an EPG memo for the President on foreign application of the National Environmental Policy Act. I understand that Messrs. Lipshutz and Eizenstat will be sending an options memo to the President very shortly on this subject, and we ask that the EPG memo go forward at the same time. The EPG memo has been reviewed and approved by the agencies listed on the first page. OMB and NSC have also reviewed it, but wish to express their views separately.

cc: Honorable Robert Lipshutz
Honorable Stuart Eizenstat

BU - find out
where / when

W/ McKenna -
wanting to see
room Thurs

Curt

Curt A. Hessler
Executive Assistant
to the Secretary
room 3407
phone 566-5901



CABINET ECONOMIC POLICY GROUP

DEPARTMENT OF THE TREASURY

WASHINGTON, D.C. 20220

August 16, 1978

MEMORANDUM FOR THE PRESIDENT

FROM: W. Michael Blumenthal
Chairman, Economic Policy Group*

SUBJECT: The Trade Impact of Foreign Application of the
National Environmental Policy Act (NEPA)

NEPA requires Federal agencies to file environmental impact statements (EISs) with respect to major agency actions "significantly affecting the quality of the human environment." A pending suit against the Eximbank raises the question whether NEPA applies when the environmental impact occurs only outside the United States.

As a matter of economic policy, overseas application of NEPA would have a considerable adverse impact on the U.S. balance of trade. As you know, last year's trade deficit exceeded \$30 billion, and could well approach \$35 billion this year. This enormous deficit puts heavy pressure on the dollar and constitutes a serious drag on the domestic economy. It is essential that we expand exports, not create new barriers to exporting.

Thus far the Administration's chief response to the export problem has been to strengthen Eximbank's budget and lending capacity. Extraterritorial application of NEPA's EIS requirement would severely handicap Eximbank. The official credit agencies of other countries are not required to prepare environmental assessments. For the following reasons, many potential foreign purchasers would likely react to an EIS requirement on Eximbank loans by simply buying elsewhere:

--Costs. The cost of preparing an EIS would seriously reduce the price competitiveness of many U.S. products. (GAO estimates the the average cost of a domestic EIS at between \$80,000 and \$125,000.)

* This memorandum expresses the views of State, Treasury, DOD, Commerce, DOE, CEA, STR, and Eximbank.

--Delays. Foreign purchasers would often prefer to buy elsewhere -- perhaps even at a higher price -- rather than face lengthy preparation of EISs. (GAO estimates a 31 month domestic average time.)

--Threat of Litigation. Domestically, the EIS requirement has generated substantial litigation. Most buyers would find unacceptable the uncertainty created by possible challenges in the courts to their EISs.

In the international commercial context, any marginal increases in costs, uncertainties as to delay, or risk of litigation usually mean a loss of business.

While the impact on Eximbank would be particularly acute, other Federal agencies, such as DOD, State, DOE and Commerce would also be adversely affected. Placing this new burden on our exports would do little to improve the world's environment. The main effect would be to divert business to foreign suppliers, whose goods and services are not environmentally superior to ours. We see no logic in a measure that would impose significant costs on our economy, through the reduction of economic activity and employment, without generating any associated environmental benefits.

You will soon receive for consideration a draft Executive Order which is intended to set the framework within which federal agencies would consider the overseas environmental effects of their activities. The draft Order has been prepared by the Department of State and the Council on Environmental Quality (CEQ) under the direction of the Office of the Counsel to the President. State and CEQ agree on some provisions in the Order, but they also have significant disagreements, reflected in alternative provisions in the draft Order you will be considering.

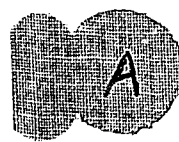
As a matter of economic policy, we would prefer delaying issuance of the Order. Given our large trade deficit, the weakness of the dollar, and the nervousness of the foreign exchange markets, issuing an Executive Order now that imposes new restraints on exports would send precisely the wrong economic signals.

However, we understand that Administration promises to two Senate subcommittees to articulate a position this month and tactical reasons in connection with the defense of

the Eximbank case argue for issuing an Order now. Therefore, we recommend that an Order be issued in the form drafted by State, but with the amendments suggested in the letter from the General Counsel of the Treasury to Ms. Margaret A. McKenna. (Tab A) Such an Order would allow each agency (in consultation with State and CEQ) to adopt procedures tailored to its needs and should avoid the cost, delay and threat of litigation associated with the EIS procedure.

We wish also to emphasize the importance of not losing the Eximbank suit. Its loss would destroy the ability of the Administration to act flexibly in formulating its policy for balancing environmental, economic and policy considerations in connection with its activities abroad. We understand that there has been some reluctance to use the defense that NEPA does not apply when the environmental effects occur solely outside the United States. The General Counsels of our agencies think that this defense is grounded on a fair reading of NEPA. Although the courts have the ultimate responsibility to decide the issue, you have the power to direct the Attorney General, as a matter of policy, fully and vigorously to defend the proposition that NEPA does not apply where the environmental effects of any federal agency action occur solely outside the United States. We urge you to exercise this power, because it is important that the Administration take a firm stand on this critical issue. Failure to be clear can only encourage additional litigation.

Attachment





THE GENERAL COUNSEL OF THE TREASURY
WASHINGTON, D.C. 20220

JUL 31 1978

Dear Margaret:

Thank you for sending us a copy of the Executive Order which reflects the present negotiations between State and CEQ. I would like to give you the following comments on the Order:

(1) It is our understanding that the Order is not issued under NEPA, but constitutes an independent Administration position designed to effectuate the Administration's desire to take into account, along with other pertinent considerations, environmental considerations when Federal actions have significant impacts outside the United States. The independence of the Administration's position from existing legislation is essential if we are to have the maximum opportunity to avoid the creation of private rights of action with all the attendant delays which they have spawned in this area. The present version of the Order leaves the important question of its relation to NEPA murky -- and in Section 1, implies that the Order may be based on that Act. We strongly urge that all reference to specific laws, particularly NEPA, be omitted from the Order. Treasury would word the introduction, Section 1 and Section 2-4(c) as follows:

By virtue of the authority vested in me by the Constitution and the laws of the United States, and as President of the United States, it is ordered as follows:

SECTION 1

1-1. Purpose and Scope. The purpose of this Executive Order is to enable responsible officials of Federal agencies having ultimate responsibility for authorizing and approving actions encompassed by this Order to be informed of pertinent

environmental considerations and to take such considerations into account with other pertinent considerations regarding such actions. This Order represents the United States Government's exclusive and complete determination of the procedural and other actions to be taken by Federal agencies with respect to the environment outside the United States, its territories and possessions.

SECTION 2

2-4 (c). Nothing in this Order shall serve to invalidate any existing regulations of any agency which have been adopted pursuant to court order or pursuant to judicial settlement of any case or to prevent any agency from providing in its procedures for measures in addition to those provided for herein.

(2) Treasury's concern that private rights of action not flow from the issuance of the Order also leads us strongly to prefer State's proposed Section 3-1. We think that courts should have the benefit of a full and clear statement of the Administration's intentions with respect to the creation of private rights of action to enforce failures to comply with the Order. State's formulation best describes the intention not to create such rights.

(3) Further, we think it essential that in connection with the issuance of this Order, the President direct Justice to defend in court any department or agency against a claim that it is obligated to comply with NEPA to the extent that a major federal action produces significant environmental effects outside the United States. Although there has been disagreement within the Administration about the correctness of that proposition, I think everyone agrees that it is a reasonable reading of the law. It is entirely appropriate for the President to direct his lawyer to make such an argument in court. An adverse decision on this proposition in the Eximbank case (or any case subsequently brought) will destroy the Administration's power to act under the flexible approach of this Order.

(4) Section 2-4(b)(i) appears to be premised on the applicability of NEPA to impacts on the global commons. We do not think that proposition has been established. Moreover, we think that under the Order departments and agencies should have the flexibility to use documents other than environmental impact statements as they do under Sections 2-4(b)(ii) - (iv). This result could be achieved by rewriting section 2-4(b) as follows:

(b) With respect to actions described in Section 2-3, agencies shall in their procedures provide for preparation of a document described in Section 2-4(a)(i), (ii) or (iii), as determined by the agency.

Further, agencies and departments should be able to create exemptions, exclusions and modifications with respect to activities having environmental effects on the global commons. Thus, Section 2-5(d) should be deleted.

(5) We agree with the Order's determination that each agency or department should devise its own procedures for taking into account environmental considerations when it acts. Requiring consultation with CEQ and State assures consideration of the most important factors which must be balanced. It would be helpful for the Order to state explicitly what it implies -- namely, that CEQ has no power itself to issue regulations to govern the conduct or procedures of departments or agencies insofar as their activities create significant environmental impacts outside the United States.

(6) Since CEQ has no power to issue regulations for an agency or department in this regard, there seems little purpose in providing it (or other federal agencies with relevant expertise) notice of the availability of environmental documents prepared under the Order. This CEQ proposed requirement (2-4(d)) adds a step, which if missed, might be the basis for challenging an agency or departmental action, in the event that the Order were construed to permit private rights of action. Moreover, identifying agencies with "relevant expertise" is not an easy or clearly defined task. Finally, we think that CEQ should not be the monitor of each environmentally-related action of a federal department or agency. CEQ's proposal implies that it is. We strongly support the State Department draft of 2-4(d).

(7) The decision to allow departments and agencies themselves to strike the balance between environmental and other pertinent considerations in designing their own requirements and procedures argues for the State Department version of Section 2-5(b) and (c). For example, the State Department language would require Eximbank to take environmental considerations into account with respect to some of its activities (such as certain substantial direct loans) while permitting it to exclude entirely export guarantee and insurance programs in which the bank has no direct involvement with the borrower and also relatively small direct loans. The CEQ draft would apparently require Eximbank to produce a document (even if very abbreviated) in connection with all these transactions. The State Department draft would also permit Treasury to exclude its advisory and consulting activities in connection with the Saudi Joint Economic Commission, which is totally financed by the Government of Saudi Arabia.

These are our comments on the portions of the Executive Order which concern us most. However, we have reviewed the entire Order and support the State version of the other sections with respect to which CEQ and State disagree.

You should also be aware that Treasury is deeply concerned that issuance of an Order which for the first time directs departments and agencies to take environmental considerations into account in their overseas activities will signal to the world that development of our export activities does not enjoy the highest priority. Such a signal now might have an adverse impact on foreign exchange markets and on the strength of the dollar. Thus, we would prefer a delay in the issuance of this Order until our balance of trade picture changes substantially, coupled with a direction to Justice fully to defend the Eximbank case.

Sincerely,



Robert H. Mundheim

Ms. Margaret A. McKenna
Deputy Counsel
to the President
The White House
Washington, D.C. 20500

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FM DORIS BRENNER //SITTO 05//
TO PHIL WISE FOR THE PRESIDENT
ZEM
UNCLAS WH81140

SITTO 05

THE PRESIDENT
THE WHITE HOUSE
WASHINGTON, D.C.
ATTENTION: DORIS BRENNER

DEAR MR. PRESIDENT:

WE WOULD LIKE TO TAKE THIS OPPORTUNITY, AS YOU BEGIN YOUR STAY
IN GRAND TETON NATIONAL PARK, TO WELCOME YOU TO WYOMING. WE
KNOW YOU WILL ENJOY YOUR VACATION AMID THESE SPLENDID
SURROUNDINGS, AND WE HOPE YOU WILL HAVE AN OPPORTUNITY TO PARTAKE
IN THE MANY RECREATIONAL ACTIVITIES AVAILABLE IN THE AREA.
AGAIN, WELCOME. CONGRATULATIONS ON YOUR FINE CHOICE IN
VACATION SPOTS.

SINCERELY,

MALCOLM WALLOP, U.S.S.
CLIFFORD P. HANSEN, U.S.S.
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PHIL WISE FOR THE PRESIDENT

TWA HIJACKING; TWA FLIGHT 830 ENROUTE FROM JFK TO GENEVA
WITH 79 PASSENGERS AND 6 CREW ABOARD WAS HIJACKED THIS MORNING
AND IS ON THE GROUND AT GENEVA AIRPORT. THE HIJACKERS IDENTIFIED
THEMSELVES AS THE "COUNCIL OF THE RECIPROCAL RELIEF ALLIANCE
FOR PEACE AND FREEDOM EVERYWHERE" ----- POSSIBLY ASSOCIATED
WITH THE HIROSHIMA ATOMIC BOMB GROUP, AND DEMAND THE RELEASE
OF NAZI WAR CRIMINAL RUDOLPH HESS AS WELL AS FOUR CROATION
AND ONE PALESTINIAN "POLITICAL PRISIONER". SWISS POLICE HAVE
SURROUNDED THE AIRCRAFT AND SWISS INTERNATIONAL RED CROSS OFFICIALS
ARE ON THE SCENE TO CONDUCT NEGOTIATIONS. A TASK FORCE HAS BEEN
ESTABLISHED AT STATE DEPARTMENT.

0141
5889

NNNN

THE WHITE HOUSE
WASHINGTON

August 22, 1978

LANDON BUTLER:

The attached was returned in
the President's outbox. It is
forwarded to you for appropriate
handling.

Rick Hutcheson

(note: Attachments not with
letters)

re: Presidential Letters to
George Meany & Douglas Fraser
Re: Labor Day Message.

THE WHITE HOUSE

WASHINGTON

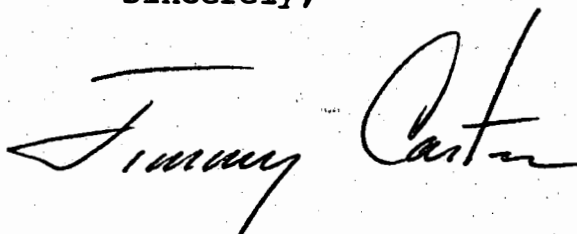
August 18, 1978

To President George Meany

As Labor Day approaches, I want to join with you in wishing the working people of America and their families a relaxing and enjoyable holiday weekend.

I am enclosing a copy of my Labor Day message for 1978.

Sincerely,

A handwritten signature in cursive script, reading "Jimmy Carter". The signature is written in dark ink and is positioned below the word "Sincerely,".

The Honorable George Meany
President
AFL-CIO
815 16th Street, NW
Washington, DC

THE WHITE HOUSE

WASHINGTON

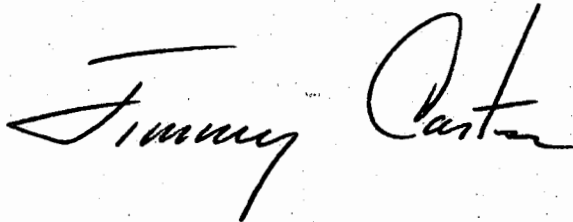
August 18, 1978

To Doug Fraser

As Labor Day approaches, I want to join with you in wishing all the members of the UAW and their families a restful and enjoyable holiday weekend.

I am enclosing a copy of my Labor Day message for 1978.

Sincerely,

A handwritten signature in cursive script, reading "Jimmy Carter". The signature is written in dark ink and is positioned below the word "Sincerely,".

The Honorable Douglas Fraser
President
International Union, UAW
Solidarity House
8000 East Jefferson Avenue
Detroit, Michigan 48214

THE WHITE HOUSE
WASHINGTON

August 22, 1978

FRANK MOORE (Ev Small)

The attached was returned in the President's outbox. It is forwarded to you for appropriate handling.

Rick Hutcheson

cc: Stu Eizenstat (FYI)

re: PRESIDENTIAL NOTE
TO CONGRESSMAN
ST. GERMAIN RE: Consumer
Cooperative Bank Bill.

8-18-78

to Congressman J. Gorman

I am pleased to sign
into law the Consumer

Cooperative Bank bill.

Message of the legislation
is a testimony to your

achieve & effective support,
& you deserve the credit
for this success & as
a pleasure to work with

you.

Jimmy Carter

THE WHITE HOUSE

WASHINGTON

August 18, 1978

MEMORANDUM FOR THE PRESIDENT

FROM: STU EIZENSTAT



SUBJECT: Note to Congressman St. Germain

As you know, the Consumer Cooperative Bank legislation has been Congressman St. Germain's highest priority for a decade, and he is upset that we have been unable to schedule a signing ceremony. Nader's staff and other advocates of the Bank have also expressed concern about this decision, although we have indicated that the schedule simply did not permit a ceremony. In view of St. Germain's position as Chairman of the Financial Institutions Subcommittee, I would recommend that you send him a handwritten note which might make these points:

- You are delighted that the Congress has enacted this vital consumer legislation, which will provide financing for consumer cooperatives that have been unable to obtain credit from conventional lenders;
- The passage of this bill is testimony to St. Germain's active and effective support, and he deserves much of the credit for this success; and
- You look forward to continuing to work closely with him on other important pieces of legislation.

Congressional Liaison concurs.